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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT, NO. 26, et al.,

Petitioners,

—v.—

STEVEN A. PICO, by his next friend, FRANCES PICO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

PAGE

Statement of the Case 1

Sequence of Events 1

Reasons for the Ban 3

Procedural History 6

Summary of Argument 7

Argument 10

I. THE ISLAND TREES SCHOOL BOARD VIOLATED THE FIRST AMENDMENT BY PROHIBITING THE USE OF BOOKS BECAUSE THEY EXPRESSED IDEAS AND VALUES OF WHICH THE BOARD MEMBERS DISAPPROVED. 10

Introduction 10

A. The First Amendment bars official conduct designed to impose orthodoxy within the schoolhouse. 11

B. A school board may not adopt a policy with respect to the removal of books from a library where that policy is plainly designed to impose orthodoxy within the schoolhouse. 15

C. Where, as here, the impermissible intent to impose orthodoxy is plain, the federal judiciary has an obligation to exercise its authority for the protection of basic First Amendment values. 20

PAGE

II. THE UNCONSTITUTIONALITY OF DEFENDANTS' BOOK BAN IS NOT OVERCOME BY THE FACT THAT SOME OF THE BOOKS CONTAIN SOME VULGAR LANGUAGE. 23

Introduction 23

A. The book ban is unconstitutional unless it is rationally related to a compelling state interest..... 26

B. Defendants' interest in teaching proper language must be pursued by narrower means than banning books..... 28

C. The school officials' concern for vulgar language cannot be separated from their concern for ideas. Even if the concern about vulgar language is a constitutionally acceptable basis for removing books, defendants cannot plausibly claim that they would not have removed these books "but for" their language.. 30

III. *AD HOC* PROCEDURES AND IMPRECISE STANDARDS VESTED THE SCHOOL BOARD WITH UNCONTROLLED DISCRETION TO CENSOR IN VIOLATION OF FIRST AMENDMENT DUE PROCESS PRINCIPLES. 31

Conclusion..... 37

TABLE OF AUTHORITIES

Cases: PAGE

A Quantity of Books v. *Kansas*, 378 U.S. 205 (1964)... 34

Cohen v. *California*, 403 U.S. 15 (1971).....29, 30

Cox v. *Louisiana*, 379 U.S. 536 (1965)..... 34

Elrod v. *Burns*, 427 U.S. 347 (1976).....26, 28

Epperson v. *Arkansas*, 393 U.S. 97 (1968)..13, 14, 15, 17, 20

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978)..25, 27, 28

Freedman v. *Maryland*, 380 U.S. 51 (1965)..... 34

Goldberg v. *Kelly*, 397 U.S. 254 (1970)..... 35

James v. *Board of Education*, 461 F. 2d 566 (2d Cir. 1972)..... 13

Keyishian v. *Board of Regents*, 385 U.S. 589 (1967).8, 11, 14, 15, 16, 20

Koppell v. *Levine*, 347 F. Supp. 456 (E.D.N.Y. 1972) .. 26

Kusper v. *Pontikes*, 414 U.S. 51 (1973) 28

Lovell v. *Griffin*, 303 U.S. 444 (1938)..... 33

Marcus v. *Search Warrant*, 367 U.S. 717 (1961) 34

Meyer v. *Nebraska*, 262 U.S. 390 (1923)....8, 11, 13, 14, 15, 17, 20

Minarcini v. *Strongsville City School District*, 541 F. 2d 577 (6th Cir. 1976) 17, 22

Minersville School District v. *Gobitis*, 310 U.S. 586 (1940).....12, 21, 22

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1977)..... 30

PAGE

NAACP v. *Button*, 371 U.S. 415 (1963)..... 9, 31

Niemotko v. *Maryland*, 340 U.S. 268 (1951)..... 33

Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972)..... 34

Police Dept. of the City of Chicago v. *Mosely*, 408 U.S. 92 (1972)..... 8, 10

Right to Read Defense Committee of Chelsea v. *School Committee of the City of Chelsea, et al.*, 454 F. Supp. 703 (D. Mass. 1978)..... 22

Roth v. *United States*, 354 U.S. 476 (1957)..... 25

Salvail, et al., v. *Nashua Board of Education, et al.*, 469 F. Supp. 1269 (D. N.H. 1979)..... 22

Shelton v. *Tucker*, 364 U.S. 479 (1960)..... 29

Shuttlesworth v. *Birmingham*, 394 U.S. 147 (1969) 9, 33

Smith v. *Goguen*, 415 U.S. 566 (1974)..... 34

Speiser v. *Randall*, 357 U.S. 513 (1958)..... 34

Tinker v. *Des Moines Independent School District*, 393 U.S. 503 (1969).....8, 13, 14, 15, 20, 24, 25

United States v. *One Book Called "Ulysses,"* 5 F. Supp. 182 (1933), aff'd. 72 F. 2d 705 (2d Cir. 1934)..... 27

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943).....12, 14, 15, 20, 21

Zykan v. *Warsaw Community School Corporation*, 631 F.2d 1300 (7th Cir. 1980)..... 22

Statutes:

42 U.S.C. § 1983 6

PAGE

Other Authorities:

Getzels, "The Communities of Education" in Leichter (ed.) *Families and Communities as Educators* (1979). 14

Guidelines for the Selection of Library Resources, Textbooks and Other Instructional Materials (New York Board of Regents)..... 27

Sharp, *The Classical Doctrine of American Separation of Powers,* 2 Chi L. Rev. 385 (1935)..... 34

Vile, *Separation of Powers* (1965)..... 34

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RESPONDENTS' BRIEF

STATEMENT OF THE CASE

Sequence of Events

In September 1975, three members of the Board of Education of the Island Trees Union Free School District, including the Board's President, Richard Ahrens, and Vice-President, Frank Martin, attended a conference in Watkins Glen, New York, sponsored by a "conservative" (J.A. 21)[1] parents group called Parents of New York United ("PONY-U").

At the Watkins Glen conference, Mr. Martin and Mr. Ahrens obtained a list of "objectionable" (J.A. 22) books together

1 Parenthetical references to "J.A." refer to the Joint Appendix filed with the Court along with Petitioners' Brief.

with a series of excerpts from these books. Interspersed with the excerpts were editorial comments about the books and their authors.[2] There was, however, no discussion of the particular books at the conference and they learned nothing else about the books except for that which appeared in the excerpts and editorial comments. (Ahrens Dep. at 21-22)[3]

Later that fall, Ahrens and Martin examined the card catalogue of the Island Trees High School library and eventually determined that nine of the "objectionable" books were in the library: *The Fixer,* by Bernard Malamud; *Slaughterhouse Five,* by Kurt Vonnegut; *The Naked Ape,* by Desmond Morris; *Down These Mean Streets,* by Piri Thomas; *Best Short Stories by Negro Writers,* edited by Langston Hughes; *Go Ask Alice* (anon.); *A Hero Ain't Nothing But A Sandwich,* by Alice Childress; *Black Boy,* by Richard Wright; *Laughing Boy,* by Oliver LaFarge; and *Soul on Ice,* by Eldridge Cleaver. They found one, an anthology entitled *A Reader For Writers,* edited by Jerome Archer, in the Junior High School library, and also discovered that *The Fixer,* was used as a reading in a high school literature course. Ahrens and Martin looked for no other "objectionable" books except those on the PONY-U list. (J.A. 129-130)

In March 1976, at the request of Ahrens, the Superintendent directed the removal of the books from the library shelves. On March 19, the Board issued a press release in an effort to justify its book removal decision. The Board explained that Ahrens and Martin had attended the PONY-U conference, where they learned of books "found in schools throughout the country which were anti-American, anti-Christian, anti-Semitic, and just plain filthy." (J.A. 8) The Board further

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2 The leaflets containing the list of objectionable books, together with the excerpts and the editorial comments, are set forth at J.A. 30-42.

3 Parenthetical references to "Ahrens Dep." and "Martin Dep." refer to transcripts of depositions of these two defendants taken in November 1977. The depositions have been made part of the record in this case.

explained that they found that nine "of these objectionable books were in [the Island Trees High School] library." (J.A. 9)

The matter was publicly aired at an open meeting of the Board on March 30. The Superintendent of the School District, Richard Morrow, criticized the Board for removing the books on the basis of a list prepared by outsiders and for by-passing established procedures for handling such matters. He recommended that the books be returned to the shelves pending appropriate review. Instead, the Board reaffirmed its earlier decision to remove the books. It did, however, establish a book review committee to read the books and to recommend whether or not the books should be banned. (J.A. 60)

On July 1, 1976, the committee submitted its report to the Board recommending restoration of five books and removal of three. There was a tie vote on two books and no recommendation was made on one, *A Reader for Writers,* because Committee members had not had an opportunity to read it. (J.A. 67)

On July 28, 1976, the Board enacted resolutions that "removed from elementary and secondary libraries and for use in the curriculum" nine of the books. The Board restored *Laughing Boy* without restriction and restored *Black Boy* "on a restricted basis." (J.A. 75-79) It was the first time the Island Trees School Board had ever taken such action. (Ahrens Dep. at 12)

Reasons for the Ban

The reasons given by defendants for banning the books are contained in the March 19 press release, in numerous statements made by Ahrens and Martin both before and in the course of this litigation, and in an affidavit submitted by the other members of the Board. (J.A. 119-120) Several pertinent facts emerge from those documents.

First, the defendant's objections to the books are limited to excerpts. Despite the Superintendent's caution that "[m]any books—among them widely acclaimed classics—contain brief passages which, if taken out of context, would seem to con-

demn them," (J.A. 55-56), defendants have made no effort to formulate an objection to any book taken as a whole. Indeed, defendants removed some books even though they believed that those books, taken as a whole, were not objectionable. (J.A. 130)[4]

Second, the ban was imposed without any professional confirmation of the board members' judgments of the books. Although a book review committee was convened, which reviewed the books for two months, members of the board never discussed the books with the committee, received no explanation of its deliberations, and ultimately ignored its recommendations. (J.A. 129) Neither librarians employed by the district, nor teachers, nor outside experts were consulted by the board members, nor did the Board consult publications which rate books for school libraries. (J.A. 128-129) If the Board had done so, they would have found that every book except *A Reader for Writers* was recommended as educationally suitable for high school students.[5]

Third, the ban was absolute. No book could be used for any course, either as required or optional reading. Although the ban did not preclude discussion about the themes of the books, the books themselves could not be used in the discussion (J.A. at 131), nor were teachers permitted to suggest that students read the books in order to prepare for any such discussion. (Ahrens Dep. at 24, 57-58)

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4 The defendants removed some books because of excerpts deemed offensive to religious, racial or ethnic groups, though they understood that the excerpts might not "reflect the thematic point of view of the entire book to that racial, religious or ethnic group." (J.A. 130)

5 *A Reader for Writers* was not evaluated. The others were recommended for use by periodicals such as *Library Journal, School Library Journal,* and *Booklist.* The appendix to the *amicus* brief filed by the Association of American Publishers and other organizations contains references to these reviews as well as to the numerous prizes and awards that have been bestowed upon these books.

Fourth, despite the defendants' oft-stated objection to the books' profanities and sexual explicitness, they never sought to determine whether any other books in the school libraries were similarly objectionable. (J.A. 129-130) The inference, that they were concerned more about ideas than words or sex, is borne out by the record. For example, in *A Hero Ain't Nothing But A Sandwich,* Nigeria Greene, a black teacher in a black public school, calls her students attention to the fact that George Washington was a slave owner. She tells the reader her thoughts about the irony of this hero's place in her curriculum. The Board's conclusion that her thoughts were anti-American was one of the reasons for banning the book. (Martin Dep. at 20-23; Ahrens Dep. at 89)

The leaflet that Martin and Ahrens received at the PONY-U conference says even more about the political ideas that precipitated this book ban. Eldridge Cleaver, whose *Soul on Ice* was listed as "objectionable," was described as a "Leader of Black panther [sic] and not allowed to live in America." "The book," the leaflet says, "is full of anti-American material." (J.A. 30) The leaflet criticized *A Reader for Writers* because an essay in the volume "equates Malcolm X, considered by many to be a traitor to this country, with the founding fathers of our country." (J.A. 39)[6]

Religious ideas also prompted the ban. The March 1976 press release stated that some of the books were "anti-Christian" and "anti-Semitic." (J.A. 8) Similar views were expressed in the course of the litigation. Ahrens conceded that, although *The Fixer,* taken as a whole, was sympathetic to the plight of Jews during a period of persecution in Russia, the book was

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6 The edition of *A Reader for Writers* that the defendants found in the library did not have the Malcolm X selection, so defendants justified banning the book because it contained Jonathan Swift's widely acclaimed essay "A Modest Proposal." Defendants objected that eating babies, Swift's bitterly ironic solution to the over-population and hunger problems in Ireland, had no relevance to the curriculum. (Ahrens Dep. at 48-49, 93, 94; Martin Dep. at 14-15.)

banned because he thought that some passages might be objectionable to Jews. (Ahrens Dep. at 88) As for *Slaughterhouse Five,* defendant Martin referred to it as ". . . blasphemous and anti-Christian. No one could think otherwise" (J.A. at 103), while the PONY-U leaflet, in boldface letters, called attention to a lengthy passage that contains no vulgar words, but which suggests that Christ was crucified because he was a "nobody". (J.A. 34-35)

In sum, the school board concluded that these books were objectionable because they projected values and portrayed viewpoints that were antithetical to the values and beliefs of the school officials. From the time that the school board members first learned of these books at the PONY-U conference through the events which culminated in the removal of these books from the Island Trees school libraries, defendants evinced a consistent desire to exclude ideas, thoughts and values that were un-American, anti-Christian, anti-Semitic and generally disagreeable.

Procedural History

This case was initiated in January 1977 when plaintiffs filed an action in New York State Supreme Court, Nassau County, challenging the book removal decision of the Island Trees school board. The suit was brought as a class action on behalf of all junior and senior high school students in the district alleging a violation of the students' federal and state constitutional rights as well as a denial of the guarantees of 42 U.S.C. § 1983. In addition to their own First Amendment rights, the plaintiffs also asserted the rights of librarians and teachers within the district to academic freedom in the selection and utilization of educational materials. Declaratory and injunctive relief was sought to the end of returning the books to the Island Trees library and permitting their use in the curriculum.

Defendants removed the action to federal court, and plaintiffs' motion to remand to state court was denied. Plaintiffs

then moved to certify the case as a class-action. Subsequently, the parties cross-moved for summary judgment.

In a decision dated August 5, 1979, the district judge denied class certification, denied the students standing to assert the rights of librarians and teachers, and granted defendants' motion for summary judgment.

An appeal was taken to the Court of Appeals for the Second Circuit, which reversed the judgment of the District Court and remanded the matter for trial. Writing for the Court of Appeals, Judge Sifton was of the view that the judgment of the District Court should be reversed and that plaintiffs were entitled to summary judgment without the necessity of a remand for additional fact-findings. Judge Newman joined Judge Sifton in the view that a reversal of the lower court opinion was appropriate. He believed, however, that the present record was insufficient to entitle plaintiffs to judgment in their favor and that a remand to the trial court was necessary to develop a plenary record on which the issues in this case might appropriately be determined. Judge Mansfield dissented from the decision to reverse.

The defendants' petitions for rehearing and rehearing *en banc* were denied by the Court of Appeals on March 3, 1981. Defendants' petition to this Court for a writ of certiorari was granted on October 13, 1981.

SUMMARY OF ARGUMENT

This controversy involves the constitutionality of a decision by a local school board to remove several books from a high school library, one book from a junior high school library, and to prohibit the use of any of them in the curriculum. The books have been widely praised and have won numerous literary prizes and awards. They have also been recommended for adolescent readers by various professional rating services. Nevertheless, the books were physically removed and banned because they contained passages that members of the school

board found "inconsistent with the basic values of the community that elected them." *Pico* v. *Board of Education,* 474 F. Supp. 387, 397 (E.D.N.Y. 1979).

Thus, at bottom the clash between the school board and the students in this case is a classic First Amendment confrontation between a transient majority that seeks to deploy the force of government to censor unpopular expression and those who seek to express—or be exposed to—differing perspectives.

Traditional First Amendment "neutrality" principles prohibit the state from engaging in content-based distinctions regarding expression and from promoting a favored set of values. *Police Dept. of the City of Chicago v. Mosley,* 408 U.S. 92 (1972). But public school officials are required to make content-based judgments and are expected to promote societal values. As noted by the Court of Appeals, "the application of the prohibitions of the First Amendment to secondary school education presents complexities not encountered in other areas of government activity." 638 F. 2d at 412.

While recognizing the historic inculcative function of public education, this Court has, at the same time, been careful to point out that the authority of the state and of school boards, in these respects, is not unlimited. In a line of cases ranging from *Meyer v. Nebraska,* 262 U.S. 390 (1923) to *Tinker v. Des Moines Independent School District,* 393 U.S. 503 (1969), this Court has grappled with the tension between the First Amendment's commitment to the heterogeneity of ideas and the existence of a public education system with the capacity to inculcate societal values. In resolving that tension, this Court has insisted that, whatever may be the inculcative authority of the state or of the local school boards, "the First Amendment . . . does not tolerate laws [or policies] that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). In its insistence that school authorities respect diversity, the First Amendment comports with sound democratic principles regarding the role of public education. Both the First Amendment as well as democratic

precepts command a commitment to the diversity of values and beliefs.

This doctrinal tradition has forceful application to the instant controversy. For it remains apparent from what these school officials said and did that the actions of the Island Trees school board grew out of a desire to impose an orthodoxy of values and beliefs. The school board's assertion that the banning of books with offensive and ungrammatical language was necessary to facilitate the teaching of proper language and grammar is a *post hoc* rationalization which is wholly unsubstantiated by any connection with established pedagogical principles. Moreover, in the present controversy, ideas and language are so inextricably bound together that it is impossible to separate the school board's putative concerns about language from their predominant ideological concerns.

There is also a second doctrinal tradition that is applicable to the case at bar. That doctrine mandates that, "[p]recision of regulation must be the touchstone" where First Amendment interests are at stake. *N.A.A.C.P. v. Button,* 371 U.S. 415, 438 (1963). This Court has repeatedly observed that, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433. These concepts have given rise to a "First Amendment due process" doctrine requiring that precise substantive criteria and regularized procedural mechanisms be employed by a governmental entity that seeks to censor expression. *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969). Writing for the Court below, Judge Sifton noted "the erratic, arbitrary and free-wheeling manner in which the defendant school officials proceeded in this case." 638 F. 2d at 416. Such arbitrary and free-wheeling behavior plainly violates "First Amendment due process" principles.

ARGUMENT

I.

THE ISLAND TREES SCHOOL BOARD VIOLATED THE FIRST AMENDMENT BY PROHIBITING THE USE OF BOOKS BECAUSE THEY EXPRESSED IDEAS AND VALUES OF WHICH THE BOARD MEMBERS DISAPPROVED.

Introduction

The central theme of the First Amendment is its commitment to a diversity of ideas. Because of that commitment, the First Amendment typically demands that government maintain strict neutrality towards the content of speech.

When people seek to use streets or parks or other public places in order to express their views, the state is powerless to make content-based judgments favoring popular speakers over unpopular ones or good ideas over bad ones. *Police Department v. Mosley,* 408 U.S. 92 (1972). No speech—whether a march, a rally, a film or a book—can be prohibited merely because the state disapproves of the views it expresses. Thus, if the state were to ban the sale of any of these books for the reasons given by the Island Trees School Board, the ban would be patently unconstitutional.

The present controversy is complicated by the fact that it takes place in an institution—the public schools—where content-based judgments about books and ideas are unavoidable and where one of the recognized institutional goals is the transmittal of certain societal values. Nevertheless, in these matters, as in all other matters relating to speech and expression within the schoolhouse, school officials are prevented by the First Amendment from eliminating disfavored ideas or values. It is a constraint which, as we shall see, has been repeatedly emphasized by this Court.

A. The First Amendment bars official conduct designed to impose orthodoxy within the schoolhouse.

For over fifty years, this Court and the lower federal courts have struggled with the tension between the nation's commitment to the heterogeneity of ideas—a commitment commanded both by the First Amendment and sound democratic precepts—and the existence of a public education system with the capacity to transmit societal values.

In resolving that tension, the guiding principle has been this Court's pronouncement that "the First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents*, 385 U.S. 589, 603, (1967). However, *Keyishian* was not the first time the Court had articulated that principle.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923) the Court had before it a Nebraska statute that prohibited the teaching of any foreign language in any school below the ninth grade. The goal of the legislation was "to promote civic development . . . ." *Id.* at 401. The Court agreed that "the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally . . . ." *Ibid.* It said that "[t]he desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate." *Id.* at 402. Nevertheless, "the individual has certain fundamental rights which must be respected." *Id.* at 401. The state's civic goal was unassailable but a "desirable end cannot be promoted by prohibited means." *Ibid.*

While conceding the right of the state "to make reasonable regulations for all schools . . . or to prescribe a curriculum for institutions which it supports," *id.* at 402, the Court held that the proscription of "knowledge by a child of some language other than English . . . is arbitrary, and without reasonable relation to any end within the competency of the state." *Id.* at 403.

In *Meyer,* the Court first began to explore the limits upon the power of a transient political majority to transmit only homogeneous values. The Court took up these issues once again in the flag salute cases. There the state's case was presented even more compellingly; the country was at war and patriotic rituals such as flag salutes were said to be essential to national survival. For a time, the argument prevailed. In *Minersville School District v. Gobitis,* 310 U.S. 586 (1940), the state's right to promote the values of the society, to encourage "a common feeling for the common country," *id.* at 598, legitimized the compulsory flag salute. Those who, by their nonparticipation, sought to express values opposed to the values represented by the flag salute, could be excluded from school.

When the Court reconsidered the compulsory flag salute, the power of the state to encourage allegiance to its values and precepts remained unquestioned. "National unity as an end which officials may foster by persuasion and example is not in question." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 640 (1943). Rather, at issue was whether that end could be pursued by eliminating dissenting values. In holding that it could not, the Court did so "with no fear that the freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Id.* at 641.

In *Keyishian v. Board of Regents, supra,* the Court invalidated a New York statutory scheme designed to prevent "subversives" from teaching in public schools and universities. While recognizing that the classroom is a proper place for inculcating values, the First Amendment imposed upon the courts an obligation to preserve heterogeneity within the schools. The Court declared:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of

> ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection. . . ."

385 U.S. at 603.

The Court returned to this theme in *Epperson v. Arkansas*, 393 U.S. 97 (1968) and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). Although *Epperson* specifically relied upon the First Amendment's protection of religious freedom, the decision again exhibited the Court's hostility to the imposition of orthodoxy within the classroom. And in *Tinker*, the Court, quoting *Meyer*, once again rejected "the principle that a State might so conduct its schools as to 'foster a homogeneous people.' " 393 U.S. at 511.

Many cases in the lower federal courts have had occasion to affirm that principle. A decision of the Second Circuit is illustrative. In *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), the Court analyzed a school board's power to prohibit a teacher from wearing a black armband. Public schools may, the court held, inculcate community values but it warned against granting school boards "unrestrained discretion," lest they "permit prejudices of the community to prevail. It is in such a situation that the will of the transient majority can prove devastating to freedom of expression." *Id.* at 575.

Judge Newman, in his opinion below, emphasized the limits of the inculcative function within public schools. He noted that, although the *James* opinion seemed to accept the authority of a school to "introdoctrinate," the use of that phrase was

> simply intended to describe the school's role in transmitting values . . . *James* pointedly condemns "indoctrination" in the sense of endeavoring to insist that one set of values must be accepted by the students . . . There is no suggestion in *James*, or in any other federal case, that the power of school officials extends beyond curriculum control to the suppression of ideas.

638 F. 2d at 432-33 n.1.

Petitioners attempt to avoid the *Meyer-Tinker-James* line of authority by relying on the tradition of local community control of education. But their exclusive emphasis on the values of the Island Trees community ignores their obligation to prepare students for the world beyond Island Trees.

The goal of public education in a democracy is the preparation of citizens capable of functioning in a complex, pluralistic society.[7] Although we have chosen to place control of public education in the hands of local communities, they retain an obligation to inculcate the pluralistic values of the society at large. When school boards seek to capture the educational process, not to advance the ends of pluralistic education, but to propagate their exclusive vision of the world, "they threaten the very process they are designed to foster." 638 F. 2d at 435 (Newman, J., concurring).[8]

The concern that transient majorities will use the public education system to exclude ideas and values other than those presently in political favor is one that the Court has repeatedly expressed in the school cases since *Meyer.* Whether the current orthodoxy is religious, as in *Epperson,* cultural, as in *Meyer,* or political, as in *Keyishian, Barnette,* and *Tinker,* this Court has consistently invoked both the First Amendment as well as its sense of the proper role of public education in a democratic society to limit the power of the state to inculcate exclusively majoritarian values.

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7 See Getzels, "The Communities of Education" in Leichter (ed.) *Families and Communities as Educators* (1979).

8 The compulsory nature of our public education system heightens the obligation of public educators to respect diversity. Serious concerns must necessarily be raised about a society that compels children to attend schools when those schools are transmitting exclusively sectarian values. These concerns would not be alleviated by the fact that the sectarian values might be shared by a transient majority of the people within a particular community. Respect for individual differences among people demands of public educational institutions, that compel attendance by force of law, a toleration for diversity of viewpoints and values. See Judge Newman's concurring opinion below, 638 F.2d at 433.

Both the First Amendment and democratic principles, however, still leave school officials with considerable discretion. The Island Trees schools may teach about the values of the Island Trees community. Teachers may encourage respect for those values; school officials may promote those values. What they cannot do is to foster community values and ideas by excluding or eliminating conflicting viewpoints.

B. A school board may not adopt a policy with respect to the removal of books from a library where that policy is plainly designed to impose orthodoxy within the schoolhouse.

As demonstrated above, there is a firm tradition within our First Amendment jurisprudence which holds that school officials cannot advance sectarian or even majoritarian interests to the point of imposing an orthodoxy of ideas or viewpoints within the schoolhouse. There remains the question of how this tradition applies, generally, to the processes of book selection and book removal, and, specifically, to the facts of this case.

School officials, of course, regularly make content-based judgments concerning the curriculum, judgments that are inevitably informed by their own values and, perhaps, the values of their community. Nothing in the First Amendment requires that school officials make curricular or book acquisition decisions without reference to those values. Nor does it forbid school officials from affirmatively emphasizing certain values as part of the school system's inculcative function. However, when school officials use their authority, even with respect to curricular and book decisions, to exclude unpopular viewpoints and values, then the teaching of *Meyer, Barnette, Epperson, Keyishian,* and *Tinker* is that First Amendment guarantees are violated.

The concern exhibited in those cases that the schoolhouse be a "marketplace of ideas" inevitably extends to actions that seek to eliminate dissenting values from the curriculum. If, as those cases say, the First Amendment proscribes the imposition of "orthodoxy," then it surely applies to that aspect of the

schoolhouse which, if unrestrained by constitutional principles, offers the most potential for imposing orthodoxy. If, as *Keyishian* says, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues,' " 385 U.S. at 603, surely the nation's future is more jeopardized by the removal from a curriculum of books that express values deemed offensive to a local community than by a loyalty oath. If the First Amendment proscribes one, it proscribes the other.

The logic of the decisions permits no other conclusion. This Court's opinions in *Tinker,* holding that school boards may not punish students or teachers who express unpopular views, did not mean to leave those school boards free to prohibit the use of books that express unpopular views. If the school board may not ban anti-war symbols, by what conceivable logic would it have the right to ban anti-war books? Or anti-American or anti-Christian books? To Judge Newman, concurring below, banning books for such reasons conveys "the message that some idea or viewpoint is not merely unsound, but is not acceptable to be aired within the school community." 638 F.2d at 433. The First Amendment will not permit school boards to convey that message.

Often, of course, the intent to impose orthodoxy will not be clear. Practical limitations of time, shelf space, money and class hours mean that not every book can be bought and not every idea can be taught. Even when an impermissible motive has influenced the process of selecting books or courses, those decisions involve so many other factors that the impermissible motive will not be easily isolated and judicial intervention will be rare.[9] As a practical matter, school officials are and will continue to be given wide latitude to make affirmative judgments about what books to buy and what to teach.

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9 However, had defendants declared that they would buy no more books that are inconsistent with the values of a majority of school board members, the First Amendment would plainly be violated and judicial intervention would be appropriate, even in the book acquisition situation.

But the situation is entirely different where school officials are engaged in negative curricular decisions, as in *Meyer* or *Epperson,* or where books are banned from a school district, as in the case at bar. This is particularly true with regard to removal from a library of books that have already been purchased and shelved.[10] As Judge Newman observed, "there are few legitimate reasons why a book, once acquired, should be removed from a library not filled to capacity." 638 F. 2d at 436. And, indeed, no legitimate justifications appear here. Nor do any legitimate reasons explain the decision to bar the use of these books in the curriculum.

Both from what the defendants said as well as what they did, it is evident that neither evaluations of competing instructional materials nor considerations of limited class time, money or space prompted the prohibition. Rather defendants' own words confirm that, in fact, their actions, both with respect to the curriculum and the library, grew out of a desire to impose an orthodoxy of values and beliefs.

The members of the Island Trees school board have repeatedly acknowledged that the books were banned because it was decided that they were inconsistent with the conservative values of the community. Once that decision was made, defendants viewed their obligation to be clear: "The majority of

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10 The general claim that school officials cannot impose orthodoxy within the schoolhouse acquires a special poignancy when applied to decisions to remove books from a library. For the library serves a somewhat different educative function than does the classroom. In the classroom, curricular choices are made, substantive areas emphasized, explicit value judgments are discussed and some inculcation of values takes place. On the other hand, the library functions as the repository for a broad array of information, viewpoints and values that are neither discussed nor emphasized within the classroom. The library plays a critical role as the student's window to worlds beyond his or her own. As the Sixth Circuit pointed out in *Minarcini* v. *Strongville City School District,* 541 F.2d 577, 582 (6th Cir. 1976), "[a] library is a mighty resource in the free marketplace of ideas." Thus, the library serves as the single institution within the schoolhouse where the First Amendment interest in heterogeneity is most profound and the government's inculcative interest is weakest.

residents in Island Trees do *not* want these books in their schools—the majority rules." (J.A. 109-110) Other statements throughout the controversy demonstrate defendants' preoccupation with excluding unorthodox ideas from the Island Trees schools. Thus, there is frequent reference to "anti-American" authors and excerpts. The author of *Soul on Ice,* one of the banned books, is described as a leader of the Black Panthers. It is said about *A Reader for Writers* that it makes a flattering reference to Malcolm X.[11] Defendants' press releases and depositions continue that theme.

Similarly, defendants express concern about anti-religious passages in the books. Both *The Fixer* and *Slaughterhouse Five* are condemned because they contain passages that are, respectively, anti-semitic and anti-religious.

Then there is the offense that two board members took to the observation by Nigeria Greene, a character in *A Hero Ain't Nothing But a Sandwich,* that George Washington was a slaveholder. They banned the book partly for that reason and now insist that this Court must endorse their action because a majority of their constituents voted in support of such a judgment. If the First Amendment means anything, it means that no agency of the state, least of all one charged with the duty to educate, may prevent students from reading a book because it mentions an unpleasant historical fact.

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11 *A Reader for Writers* is a collection of more than 80 essays and pieces of fiction. Defendants say that it was banned because of a single selection, Jonathan Swift's classic essay, "A Modest Proposal." In the essay, Swift ironically advocated eating babies, a subject that the Board considered irrelevant to the curriculum. Assuming that defendants believed that eating babies, and even irony, were irrelevant to all aspects of a high school curriculum, still it seems unlikely that they banned the book for that reason. Since no one was compelled to read the Swift essay, it would be logical to remove the book from the library only if all of the other essays were irrelevant. Defendants do not pretend to have made that judgment. Given the roster of authors in the book and the obvious relevance of some of their essays to a school curriculum (J.A. 132 to 137), one is left with the suspicion that the ban of this book had mostly to do with the remarks in the PONY-U leaflet about Malcolm X. (J.A. 39)

Since the commencement of the litigation, defendants—perhaps with applicable constitutional principles in mind—have attempted to minimize the role that such ideologically based judgments played in their decision to ban the books. Nevertheless, the fact that the books were initially removed without knowing anything more about them than was said on the PONY-U material lends support to the inference that the political, moral and religious judgments made by the organizers of the PONY-U conference have supported this ban from beginning to end.

Defendants' actions speak as pointedly as do their words. They lead to the same conclusion that no purpose other than the imposition of orthodoxy prompted defendants' actions. The record is barren of evidence that any legitimate educational purpose was even considered. Instead of the routine process of approving and disapproving proposed curricular materials, defendants undertook, in the words of the court below, "an unusual and irregular intervention," 638 F.2d at 414, in the curricular process. The books at issue were not presented to the school board by staff members seeking approval for a given course. Rather, the board learned of the books because they had been deemed "objectionable" by an organization with a particular social and political ideology. In making its decision, the board read no reviews of the books, they consulted none of the services that evaluate books for school use and sought no advice from school professionals. Indeed, they disregarded the recommendations of the "impartial", "representative" committee that they appointed to study the books. Moreover, the board's action was not merely to reject the "objectionable" books in favor of others that were more suitable, but to impose an absolute ban on the use of those books in any course in the curriculum, an action that the school board had never taken before.

In sum, the Board's statements and actions provide ample, undisputed evidence in support of the conclusion that defendants sought to remove books that portrayed viewpoints and projected values that were antithetical to the ideology shared

by a majority of the Island Trees residents. Upon such a conclusion, plaintiffs are entitled to summary judgment restoring the instant books to the school libraries and curriculum. However, if for some reason such a conclusion cannot reasonably be inferred from the evidence thus far adduced, plaintiffs should be permitted to proceed to trial in order to more fully explore the precise contours and texture of the "pall of orthodoxy" that the Island Trees school officials sought to impose.

C. Where, as here, the impermissible intent to impose orthodoxy is plain, the federal judiciary has an obligation to exercise its authority for the protection of basic First Amendment values.

In *Epperson* v. *Arkansas, supra,* at 104 the Supreme Court counseled that, "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." Yet, *Epperson's* familiar caution of judicial self-restraint is qualified. Although broad powers are afforded local school boards, the courts

> have not failed to apply the First Amendment mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief.

393 U.S. at 104.

Of course, in *Epperson* itself, the Court did intervene with respect to a curriculum decision made in the first instance by Arkansas officials. And in *Meyer, Barnette, Keyishian* and *Tinker* decisions by school officials similarly required judicial intervention. As pointed out above, the lesson of these cases is that the federal courts must and will intervene in order to prevent school officials from imposing the orthodoxy of majoritarianism within the classroom.

To the extent that our system of public education may be built upon a delicate balance between the majoritarian interest

in promoting societal values and the First Amendment prohibition against orthodoxy, the cases, cited above, also demonstrate that courts must occasionally intervene to insure that the delicate balance is preserved. The impulse toward majoritarian values is a strong one and, by definition, it will ordinarily prevail in the political process. Thus, while the Court has recognized the danger in establishing itself as "the school board for the country," *Minersville School District* v. *Gobitis, supra* at 598, it has recognized the greater danger in consigning such controversies to the polling place:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. *Barnette, supra* at 638.

In the present case, where the school officials plainly attempted to impose an orthodoxy of values within the Island Trees schoolhouse, the federal judiciary has an obligation to exercise its authority for the protection of basic First Amendment values. The resolution of this controversy, no less than the flag salute controversy, cannot depend on the outcome of an election. There is no more certain prescription for the destruction of our public schools than the prospect of school board candidates standing for election on the basis of which books they will ban from or restore to the schools.

When school officials proscribe books because they express unpopular ideas, First Amendment rights are at stake and their vindication is the singular obligation of the judiciary. Several federal courts have explicitly recognized that obligation when

school officials have banned books under circumstances similar to those presented by this case.

In *Minarcini* v. *Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976), the Sixth Circuit held unconstitutional the unshelving of certain books from the school library because they contained ideas that school board members found "distasteful." *Id.* at 582. In *Zykan* v. *Warsaw Community School Corporation,* 631 F.2d 1300 (7th Cir. 1980), high school students challenged the removal of certain books from the high school library and from the English curriculum. In adjudicating this controversy, the Seventh Circuit held that courts may properly intervene when school officials remove books from the library "as part of a purge of all material offensive to a single, exclusive perception of the way of the world. . . ." *Id.* at 1308.

In *Right to Read Defense Committee of Chelsea* v. *School Committee of Chelsea,* 454 F. Supp. 703 (D. Mass. 1978), plaintiffs challenged the removal from a school library of an anthology that contained a poem with allegedly "offensive" language. While conceding to the school board broad discretion over its curriculum, the court found that school officials had abused their discretion by " 'sanitizing' the school library of views divergent from their own. . . ." *Id.* at 714. As in the present case, what was at stake was "the right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protection." *Ibid.*

In *Salvail* v. *Nashua Board of Education,* 469 F. Supp. 1269 (D.N.H. 1979), the issue was the removal of *MS* magazine from the high school library. The school board acted because its members objected to certain advertisements and to some references to a "communist" periodical and "communist folk singers." Holding that the reasons given for the removal "failed to demonstrate a substantial and legitimate government interest," *id.* at 1275, the court ordered the board to restore the magazine.

In those cases, as in the decision below, federal courts have proceeded with appropriate caution. They have given due deference to the discretion of school officials in regulating their curricula and their libraries. But the courts have also recognized that there are limits to that discretion and that, when they are exceeded, great dangers are posed both for the academic community as well as for the society at large. At such a time, federal courts must intervene.

This case presents those dangers.

II.

THE UNCONSTITUTIONALITY OF DEFENDANTS' BOOK BAN IS NOT OVERCOME BY THE FACT THAT SOME OF THE BOOKS CONTAIN SOME VULGAR LANGUAGE.

Introduction

Defendants do not deny that their actions were in large measure prompted by their disagreement with the ideas expressed in the books. The constitutional impropriety of that motivation is discussed in point I. Defendants also insist that their book-banning resolution was motivated by a concern about vulgar language. That justification, too, is constitutionally suspect. Before exploring its deficiencies in detail, a preliminary observation is pertinent.

Although the record amply supports defendants' contention that they are offended by vulgar language, the record is far more equivocal on whether that concern actually motivated their actions.[12] As we have seen, defendants' decision to ban these particular books was precipitated by their attendance at the PONY-U conference. While there, they were given a list of

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12 Judge Mansfield's dissenting opinion assumes that vulgarity was the motivating factor behind defendants' actions, an assumption not shared by Judge Newman. 638 F.2d at 437. It should be noted that one of the books, *A Reader for Writers*, was banned although there is no indication that it contains any vulgar language whatever.

"objectionable" books and, on separate flyers, excerpts from some of the books, as well as comments about some of the books and authors. Most of the excerpts contained vulgar language.

Despite the abundance of vulgar language in those materials, the record suggest that vulgarity was simply a pretext for this action. That is the only plausible explanation for the fact that at no time since the PONY-U conference has the school board ever reviewed its library collection to see if any other books contained vulgar language. Nor has the board ever attempted to explain its idiosyncratic concern. As Judge Newman noted after reviewing the record:

> A school's effort to regulate vulgarity is not unconstitutional because it is not completely thorough, but if only isolated examples are condemned, the inference will be strengthened that vulgarity was the excuse, not the reason, for book removal whose principal, or at least partial motivation was political.

638 F.2d at 437.

Even if vulgar language were the reason, and not the excuse, for defendants' action, it is not a constitutionally sufficient justification for banning the use of books in a school system. Defendants allege that such language is offensive to a majority of the parents in their community and we have no reason to doubt them. Nor do we doubt that these parents do not permit such language in their home and do not want such language in their school. It does not follow, however, that, because parents can keep books containing such language out of their home, school boards as their representatives can keep those books out of their schools.

The school board is not simply the parent to the children of the school district. It is also an agency of the state. Unlike parents, it must operate within the constraints of the Constitution. Although children have no First Amendment rights while at home, they do when they are at school. *Tinker* v. *Des*

Moines Independent School District, 393 U.S. 503 (1969). Parents may forbid children from wearing black armbands; schools may not.

Similarly, with respect to vulgar language, parents may do as they wish. If they believe that prohibiting their children from reading these books at home is an appropriate means of teaching proper language, they may do so, whether or not the means is a rational one.

School boards, however, must take account of the First Amendment. They, like parents, of course have the right to teach proper language, but, unlike parents, they are limited in the means they may choose. They may, of course, teach that vulgarity is bad and may prohibit its use in the classroom. The prohibition is a narrow one, and the consequences are limited. Moreover, the justification for the prohibition is compelling; to permit such language in class discussion carries with it an implicit endorsement of such language by students.

Banning books, however, is another matter. When, as in the case of each of these books, the vulgar language is a minor aspect of a book that is otherwise widely respected, then the effect is much broader. Not only vulgar language but a worthy book has been banned.[13] Moreover, the justification for the ban is far more attenuated. Permission to read a book surely carries with it no suggestion that all of its language is appropriate for use in a classroom or anywhere else, and it is, in any case, a suggestion easily disspelled.

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13 It is because language and excerpts, viewed outside of their context, can give a distorted impression of a book that this Court has insisted that judgments of obscenity be based on the whole book. *Roth* v. *United States,* 354 U.S. 476 (1957).

In his dissent in *FCC* v. *Pacific Foundation,* 438 U.S. 726, 770 n.5 (1978), Justice Brennan shows how respected books can be made to appear vulgar by the judicious selection of excerpts. Judge Mansfield's dissent in the Court below achieves the same dubious result with books that have won and been nominated for some of the nation's most valued literary awards.

Banning books because of isolated passages of vulgar language is not rationally related to the teaching of proper language. Even if it were, there are means available to achieve that end that less drastically impinge on First Amendment rights.

A. The book ban is unconstitutional unless it is rationally related to a compelling state interest.

This Court has often reiterated that government regulation that abridges First Amendment rights can only be sustained if it is rationally related to a compelling state interest. See, *e.g.*, *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976). In this case that nexus is conspicuously absent. There is, specifically, no rational relationship between the removal of these books and defendants' desire to teach proper language and grammar.

The Board's position on this issue was summarized by its President. Speaking of *A Hero Ain't Nothing But A Sandwich*, he said, "It is completely improper English and you can't try to teach proper English and allow students to read things that are improper." (Ahrens Dep. at 54-55) The assumption appears to be that students, even by the time they reach high school, are unable to appreciate that dialogue in books is not intended as a grammar lesson.[14] If they are that unsophisticated, what serious modern author will they be able to read? If students will simply imitate the language that characters use in books, can they be safely permitted to read books whose characters speak with foreign accents or in regional dialects? Should students not be permitted to read Shakespeare, for fear they will imitate his characters' slang?

Some of the language to which the Board objects is the kind "heard repeatedly by those who walk the streets of our cities." *Koppell* v. *Levine*, 347 F. Supp. 456, 459 (E.D.N.Y. 1972). Will the Island Trees school libraries be permitted to retain any

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14 All of the passages to which defendants object are of characters' dialogue. Defendants do not claim that any of the books are otherwise ungrammatical or vulgar.

books that accurately depict city life? Or will they be permitted to retain only those books that sanitize language and, thus, sacrifice accuracy?

It is fair to suggest that a consistent application of defendants' policy concerning bad language would jeopardize much of modern fiction and most nonfiction that attempts to reproduce how people speak in their unguarded moments. The words of Judge Woolsey in his landmark decision lifting the ban on Joyce's *Ulysses* are particularly apt:

> The words which are criticized as dirty are old Saxon words known to almost all men and I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical, and mental, Joyce is seeking to describe.

United States v. *One Book Called "Ulysses"*, 5 F. Supp. 182, 183-184, aff'd 72 F. 2d 705 (2d Cir. 1934).

The irrationality of banning books on the basis of isolated passages is further evident from the *Guidelines for the Selection of Library Resources, Textbooks and Other Instructional Materials* issued by the New York Board of Regents, the agency with overall responsibility for standards of education in New York State. Those Guidelines caution that a literary work ". . . be judged as a whole" and that, where a book contains "sexual incidents or profanity," a decision as to its propriety for school use should be "made on the basis of whether the book presents life in its true proportions, whether circumstances are realistically dealt with, and whether the book is of literary value."

Despite the tenuous justification for banning books because of occasional vulgar language, defendants argue that the constitutionality of their actions is demonstrated by *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). However, that decision was founded on concerns not present here. The Court noted, first, that radio broadcasts are accessible to young, unsupervised children. But students in the Island Trees junior

and senior high schools are teenagers. In the unlikely event that guidance or counseling were necessary, teachers or librarians are available to offer it.[15]

The Court was also concerned that a radio broadcast could be received at home, where the right to be free from offensive words may justify a higher degree of state regulation. Schools, however, are not homes; exposure to thoughts and ideas—and means of expressing them—that are not heard at home is one of the purposes for which schools exist. Nor do these books, in their occasional use of profanity, bear any resemblance to the pervasively vulgar monologue at issue in *Pacifica*. Whether or not the broadcast of these books on the radio would be appropriate, their use in school is surely a legitimate part of the educational experience of junior and senior high school students.

B. Defendants' interest in teaching proper language must be pursued by narrower means than banning books.

Even if there were a plausibly rational connection between defendants' ban of these books and their interest in teaching proper language, defendants' actions in this case run afoul of another fundamental First Amendment principle.

It is well settled that when a government interest impinges upon First Amendment rights, "it is not enough that the means chosen in furtherance of the interest be rationally related to that end." *Elrod* v. *Burns, supra,* 427 U.S. at 362. "If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . [means] that broadly stifles [free speech]." *Kusper* v. *Pontikes,* 414 U.S. 51, 59 (1973).

The Island Trees book ban "broadly stifles" free speech. In their indiscriminate condemnation of vulgar language, defendants ignore the relationship between ideas and the words used

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15 That the books banned by defendants were recommended for use in junior and senior high schools by book reviewers suggests that the fear of "enlarg[ing] a child's vocabulary" *id.* at 749, is not relevant here.

to express them, *Cohen* v. *California,* 403 U.S. 15, 26 (1971), and thereby censor ideas that draw their "emotive" force, *ibid.*, from the powerful, and sometimes harsh and vulgar language with which they are expressed.

Consider, for example, *Go Ask Alice,* a book about a teenage drug addict who commits suicide. It is a devastating indictment of drug use. It may be that the same factual information is contained in bulletins from the National Institute of Drug Abuse, but it is not probable that many adolescents read them. In any case, if, as seems likely, *Go Ask Alice* will have a greater emotional impact on potential drug users than a NIDA bulletin, consider the terrible price that some students may be paying because their school board does not like dirty words.

There are, of course, means available to the defendants to teach their students proper language or respect for certain values without preventing them from reading valuable books. Indeed, the alternatives are so obvious that one hesitates to belabor the point. Students can be allowed to read—and, perhaps, criticize—bad grammar in order to learn proper grammar. Alternatively, the books could be banned from use in grammar classes. If some of the language in these books is, as defendants claim, degrading to blacks or women, could an effective lesson in the use of non-racist and non-sexist language not be built upon such passages? But surely books as highly regarded as these, books uniformly recommended for use in junior and senior high school libraries, books that include among them some of American literature's most perceptive depictions of life in this country, cannot be unsuitable for any use in the school curriculum.

If there are any legitimate goals of the book ban, there are countless means available to accomplish them short of a total prohibition. Since the ban is not the alternative that least drastically restricts First Amendments rights, *Shelton* v. *Tucker,* 364 U.S. 479 (1960), it is, for that reason alone, unconstitutional.

C. The school officials' concern for vulgar language cannot be separated from their concern for ideas. Even if the concern about vulgar language is a constitutionally acceptable basis for removing books, defendants cannot plausibly claim that they would not have removed these books "but for" their language.

Even if the Court were to hold that defendants' concern about vulgar language is a constitutionally sufficient motive for banning books, and even if defendants could establish that their concern with vulgar words was not a pretext for their actions, the ideological motive for the ban would continue to render it unconstitutional. As Judge Newman noted in his concurring opinion, "First Amendment values would be imperiled if a motivation concerned with the language of a book were permitted to justify an act of suppression also motivated by the book's political content." 638 F.2d at 438. This Court's analysis of the mixed-motive question in *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), is not to the contrary.

In *Mt. Healthy,* the Court held that, when a discharge from employment may have been prompted by both protected and unprotected conduct, the employee was obliged to prove that he would not have been discharged "but for" the exercise of his First Amendment rights. The assumption underlying the Court's opinion is that the permissible motive can be separated from the impermissible motive. That cannot be done here. Vulgar language, the arguably permissible motive, still enjoys some constitutional protection. *Cohen v. California, supra.* If, as *Cohen* tells us, ideas are often inseparable from the words used to convey them, then in cases such as the one presented here, motives may be so inextricably interwined as to preclude the isolation of permissible from impermissible motives.

Accordingly, it is simply impossible to engage in the "but for" analysis described in *Mt. Healthy* when dealing with language and the ideas conveyed by that language. As Judge Newman observes, "the content of a book and its manner of

expression are too intimately related to be subject to entirely separate analysis." 638 F.2d at 438. Petitioners do not even pretend that these factors were separate in their minds and have never asserted that the books would have been removed from the library shelves solely because of their language.

The Island Trees school officials sought to exclude ideas which made them uncomfortable. In so doing they have acted unconstitutionally and their behavior is not redeemed on the ground that part of their discomfort flowed from the words which were used to express distasteful thoughts.

III.

AD HOC PROCEDURES AND IMPRECISE STANDARDS VESTED THE SCHOOL BOARD WITH UNCONTROLLED DISCRETION TO CENSOR IN VIOLATION OF FIRST AMENDMENT DUE PROCESS PRINCIPLES.

Respondents have demonstrated that the book ban imposed by the Island Trees school board violates substantive constitutional standards. This Court has also repeatedly recognized, however, that the process by which government seeks to regulate areas infused with First Amendment values is critical in maintaining "breathing space" for First Amendment rights. The *ad hoc* nature of the process utilized by the school board in banning the nine books vested the board with virtually uncontrolled discretion to act as a censor, leading Judge Sifton to condemn the "erratic, arbitrary and free-wheeling manner," 638 F.2d at 416, in which the defendants behaved. It is to avoid such behavior that this Court has long required that the state act pursuant to established standards and procedures when regulating in areas that touch upon First Amendment freedoms. *NAACP* v. *Button,* 371 U.S. 415, 438 (1963).

At no time has the Island Trees school board ever elaborated a set of substantive standards setting forth educational policy

governing the selection and/or retention of books[16]. (J.A. 25) Instead, members of the Board sought to judge the books against such vague and amorphous criteria as "anti-American," "anti-Christian," "anti-semitic," "just plain filthy," "inappropriate," "not germane to the curriculum," and "incompatible with community values." Such a bewildering array of *ad hoc* criteria hardly qualifies as a serious attempt at enunciating a generally applicable set of standards which are capable of curtailing politically motivated censorship.

The Board's *ad hoc* decision-making process has made it virtually impossible to discern what, if any, educational policy the Board was seeking to advance in banning the books. As Judge Sifton noted below:

> What is required in order to avoid the effect of governing school affairs by a vague and indefinite pall of orthodoxy is the development of a set of sufficiently objective criteria for the identification of speech which will be objected to and a sufficiently regular procedure for applying those criteria in concrete cases. . . .

638 F.2d at 418 n.13.

Instead of "sufficiently objective criteria," the Board elected to proceed on a purely subjective basis, evaluating each book pursuant to vague and shifting criteria which evolved as the board went along.

The net result of the board's failure to enunciate articulable standards against which its specific acts may be measured was the emergence of a discretionary process which invited arbitrary and improperly motivated decision-making.

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16 The closest the Board has come to enunciating a policy is the "academic freedom" clause in its collective bargaining agreement which guarantees teachers "the right to introduce and to explore controversial material provided only that the material and manner in which it is presented are in good taste, appropriate to grade level, and relevant to course content." (J.A. 52) Disputes as to particular books were to be resolved by a committee appointed by the Superintendent. (J.A. 56)

As Judge Sifton pointed out in the Court below, the school board's decision suffered from "substantive confusion, not to say incoherence, as to the reasons the books were being removed from the libraries." 638 F.2d at 417. In March 1976, the school board announced that "the books . . . contain material that is offensive to Christians, Jews, Blacks and Americans in general . . ." (J.A. 9) In April, it instructed the Book Review Committee to evaluate the books on the basis of "(1) their educational suitability; (2) good taste; (3) relevance; [and] (4) appropriateness to age and grade level." (J.A. 67) In July, the Book Review Committee advanced specific recommendations with respect to the books, and the school board rejected those recommendations without giving any reasons whatever. In October 1977, the *post hoc* rationalizations for the book-banning included the observation that the school boards' decision "reflect[ed the] values and wishes" of the community. (J.A. 28-29). It is impossible to imagine a more arbitrary, standardless procedure than that employed by defendants.

In *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969) the Court found a Birmingham ordinance to be unconstitutional because the ordinance conferred upon the city commission virtually absolute power to prohibit any "parade", "procession" or "demonstration" on streets or public ways. In doing so, the Court noted that the ordinance lacked "the narrow, objective and definite standards to guide the licensing authority." *Id.* at 150-151. The concern expressed in *Shuttlesworth* was that such vaguely worded ordinances conferred excessive discretion upon local officials and thereby invited arbitrary censorship.[17] Precisely the same concerns apply to the case at bar.

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17 Permit cases such as *Lovell* v. *Griffin*, 303 U.S. 444 (1938) and *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) are examples of settings in which this Court has declined to allow the complete fusion of the enunciating and implementing functions in the regulation of First Amendment activity. Other examples are statutes which purport to regulate expressive activity, but do so in such vague terms that they grant the implementing official the power to make policy even as he

A general concern about vague and imprecise standards is compounded where, as here, the very same administrative officials that are authorized to promulgate a standard are also authorized to enforce it. Indeed, our constitutional tradition informs us that whenever the same governmental body is vested with the power to enunciate general rules and the power to apply those rules to specific settings, the danger of governmental arbitrariness exists.[18] The danger of governmental abuse is unquestionably heightened when such a body is permitted to act in the absence of articulated pre-existing standards. The operation of the schools may be one of those settings where it is appropriate to permit the merging of the rule-making and enforcement functions. But when fragile values of academic freedom and the First Amendment are at stake, public officials may not make up the rules at the same time as they decide to enforce them. The requirement of pre-existing standards increases the likelihood that some rational, deliberative process will precede official action.

In *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), the Court noted that "the line between speech unconditionally guaran-

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(footnote continued)

implements it. See *Cox v. Louisiana*, 379 U.S. 536 (1965); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Smith v. Goguen*, 415 U.S. 566 (1974). Similarly, in the context of the seizure of allegedly obscene material, the Court has insisted upon independent judicial determinations as a check upon the potential abuse posed by permitting law enforcement officials to effectively define the crime and penalize the criminal conduct at the same time. See *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). See also *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

18 The most obvious manifestation of our preference for placing the power to enunciate and the power to implement in different governmental bodies is the principle of Separation of Powers. Even within a single branch, moreover, care is generally taken to separate the two functions. Thus, in a judicial setting, power is diffused between judge and jury; in an administrative setting, power is often diffused among specialized organs; and in a legislative setting, bi-cameralism serves to provide a degree of separation. See generally, Sharp, *The Classical Doctrine of American Separation of Powers*, 2 Chi. L. Rev. 385 (1935); Vile, *Separation of Powers* (1965).

teed and speech which may legitimately be regulated, suppressed or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for sensitive tools. . . ." Among the most efficient of these "tools" is the imposition of the relatively straightforward obligation that censorial decisions be preceded by rational, deliberative processes. At the most rudimentary level a public official, engaging in censorship, should be required to "state the reasons for [a] determination and indicate the evidence [or criteria] relied on." *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970).[19]

Where public officials act in the absence of standards, rational decision-making is difficult if not impossible. Defendants' actions illustrate the point. Although there was a period of five months between November, when Ahrens and Martin discovered the books in the school libraries, and March, when the board ordered that the books be removed, the board had still not articulated any reasoned standard to justify their action. Finally, in April the Board selected a book review committee with instructions to read the books and advance recommendations as to their disposition. The committee convened in July and made certain recommendations, concluding that five out of the books be returned to the library. The school board, without any explanation whatever, simply disregarded the recommendation of the book review committee. That the school board felt free to do so was the inevitable consequence of the absence of substantive standards and procedural requirements.

A requirement that a school board, contemplating censorship, act pursuant to an articulated policy of general applica-

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19 One virtue of the procedural requirement that an administrative official state reasons for a determination is that such a statement enables a reviewing court to evaluate the administrator's reasons. Where, as in a book removal situation, a court might be called upon to evaluate the motive underlying an administrative decision, such a statement can, indeed, prove useful. Regrettably, no such contemporaneous statement with respect to each of the books exist in the case at bar.

tion would achieve the salutary purposes that First Amendment due process mechanisms are intended to serve. Such a requirement would limit otherwise untethered discretion. It would guard against the potential invocation, by implementing officials, of *post hoc* rationalizations for their conduct, and it would thereby reduce the possibility that impermissibly motivated behavior will be masked by plausible but ultimately disingenuous justifications.

CONCLUSION

For the foregoing reasons, plaintiffs are entitled to summary judgment. In the alternative, the judgment of the Court of Appeals should be affirmed and this action should be remanded to the District Court for trial.

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